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Decision 01-08-061 August 23, 2001

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

State of California Department of Transportation, Cox California Telecom, L.L.C. dba Cox Communications (U-5684-C), and Coxcom, Inc. dba Cox Communications of Orange County, Complainants, vs. Crow Winthrop Development Limited Partnership, and Pacific Bell (U-1001-C), Defendants.	Case 00-05-023 (Filed May 19, 2000)

OPINION ON MOTIONS TO DISMISS

(See Appendix B for Appearances.)

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OPINION ON MOTIONS TO DISMISS

I. Summary

The State of California Department of Transportation (Caltrans), Cox California Telecom, L.L.C. dba Cox Communications (Cox), and Coxcom, Inc., dba Cox Communications of Orange County (CoxCom)[1] complain that Crow Winthrop Development Limited Partnership (Crow Development) is a public utility violating California statutes and Commission orders because it has denied Cox and CoxCom access to the existing facilities and utility conduits on Crow Development's property. According to complainants, such access is necessary for Cox to provide local exchange telephone service to certain tenants. Complainants also say that Pacific Bell (Pacific) has violated California statutes and Commission orders because it has an arrangement with Crow Development that has the effect of restricting Cox's access to Crow Development's property, and has failed to prevent property owners from limiting other carriers' access to their property.

Crow Development and Pacific have filed motions to dismiss the complaint. We grant Crow Development's motion and dismiss the complaint against it. We dismiss the complaint against Pacific without prejudice.

[1] Cox, CoxCom, and Caltrans are sometimes referred to as complainants.

II. Background

A. Competition and the Telecommunications Industry

Competition in the telecommunications industry means that many different providers may provide the same or different services to different tenants within a single industrial or commercial development. In order to do so, each provider generally needs space within the buildings and grounds of the development to accommodate its individual equipment. Implementing such competition raises various issues. For instance, what duties does an incumbent provider have to share its space with competitors? Do the incumbent's duties to compete fairly affect the incumbent's relationship with developers and building owners and managers? How are these duties affected where the developers, owners, and managers are themselves wrangling over who controls what?

The Commission has confronted similar issues before and has adopted various policies. (*See e.g.*, Decision (D.) 98-10-058, the Commission's Rights-of-Way Decision.)[2] It is now required to interpret the application of various statutes and Commission orders to the complex dispute that underlies this case, as well as in the companion case (C.00-05-022), where one of the complainants seeks to acquire access to the development by condemnation.[3] In the case we address in this decision, the complainants (including a tenant of the development) proceed on the theory that, even short of condemnation, current law requires that the

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[2] D.00-03-055 modified the Rights-of-Way Decision and denied rehearing.

[3] In D.00-11-038, rehearing denied in D.01-02-078, the Commission dismissed the proceeding without prejudice to Cox refiling the complaint, depending on the outcome of pending Superior Court litigation over Cox's entitlement to access the utility easements.

incumbent (here, Pacific) and owner (here, Crow Development), give the competitor (here, complainants Cox and CoxCom) access for its equipment.

We grant Crow Development's motion to dismiss, and dismiss the complaint against Pacific without prejudice. Our principal holding as to Crow Development is that Crow is not a public utility over which the Commission has jurisdiction because it has not, as a matter of law, "dedicated" its property to public use. As to Pacific, we dismiss the complaint without prejudice to complaints refiling its claims against Pacific after the Superior Court renders a final decision concerning entitlement and access to the utility easements.

B. Other Court and Administrative Actions

The parties to this proceeding, and others, are involved in multiple actions both at this Commission and in the Superior Court. These actions concern the same underlying problem, that is, access to the existing utility easements. It is unnecessary to describe the various proceedings here, but Appendix A contains a brief overview of them. The importance of these proceedings is that some of the issues raised in this complaint can more appropriately be addressed in the other proceedings, and that the Superior Court's findings should be determinative on the nature of the parties' property rights to the utility easements.

C. The Instant Case

In the instant case, complainants allege that Crow Development has denied Cox and CoxCom access to the existing facilities and easements on Crow Development's property because of a private dispute between Crow Development and Jamboree L.L.C. (Jamboree) over further construction and use of an office development called Park Place. Jamboree is the current owner of the facility parcel, that is, the building (and underlying land) to which

Cox seeks to provide telephone service.[4] Crow Development owns a majority of the surrounding 90 acres (development parcel.)

Complainants allege that Jamboree has requested that Crow Development grant Cox an easement (to the extent an easement does not already exist) to allow Cox to provide local exchange service to the tenants located on the facility parcel. Complainants also allege that Crow Development owns the facilities and easements at issue, and manages and controls all "telephone lines" (conduits and ducts, as enumerated in § 233) for compensation, and consequently is operating as a public utility without Commission authorization. Complainants also allege that Crow Development is discriminating against Cox, while permitting Pacific access to the utility easements to offer telephone service, and that Crow Development has violated § 2111, which provides that every person (other than a public utility) who knowingly violates the Commission's decisions or rules is subject to penalty.

Complainants allege that Pacific has violated Commission orders, specifically the Rights-of-Way Decision, in that Pacific has an arrangement with Crow Development that has the effect of restricting Cox's access to the property, and California statutes, specifically § 626, because Pacific has failed to prevent property owners from limiting other carriers' access to their properties.

Complainants have filed a motion for temporary restraining order (TRO) and preliminary injunction with their complaint. They request that the Commission require Crow Development to cease (1) operating as a public utility

[4] See Appendix A for a more detailed description of the evolution of Jamboree, and the specific facts underlying the dispute between Crow Development and Jamboree.

without Commission authorization, and (2) denying Cox access to existing utility easements at Park Place. Complainants allege that they have suffered harm in that Crow Development is interfering both with Cox and CoxCom's ability to provide cable and telephone service, and with Caltrans' fully deploying its transportation management system located on the facility parcel. They request that the Commission (1) determine the terms and condition for CoxCom's use of Crow Development's support structures to provide cable television service; and (2) assess penalties immediately against Crow Development, and within 60 days against Pacific if Pacific fails during that time to renegotiate its arrangement with Crow Development to provide telephone service to the facility parcel.

D. Posture of the Instant Case

On June 20, 2000, prior to the prehearing conference (PHC), Crow Development filed a motion to dismiss the complaint as to itself. Complainants filed a timely opposition, to which Crow Development replied.

On July 3, 2000, prior to complainants' responding to this motion, the assigned Administrative Law Judge (ALJ) held a PHC where, among other things, she asked the parties to draft a joint statement of undisputed material facts, as to the jurisdiction issue for Crow Development, and as to all issues for Pacific. To the extent the parties were unable to agree as to all undisputed material facts, the parties were directed to file separate statements of disputed material fact and to state why they are integral to the jurisdiction issue. The purpose of these factual statements was to assist the Commission in determining whether hearings on the jurisdiction issue would be necessary and in scoping the case in the event the motion to dismiss was denied.

On July 21, the parties tendered their joint and separate statements of material fact. No party requested further briefing. Additionally, on

July 25, 2000, Pacific filed a motion to dismiss. Complainants filed timely opposition.

E. Need for a Hearing

No hearing is necessary to resolve the issues raised in this complaint because we grant both motions to dismiss as more fully stated in this decision. Accordingly, pursuant to Rule 6.1 of the Commission's Rules of Practice and Procedure, Article 2.5 of those Rules ceases to apply to this proceeding, with the exception of Rule 7(b), which shall continue to apply.

III. Discussion

A. Standard of Review for Motions to Dismiss

A motion to dismiss[5] essentially requires the Commission to determine whether the party bringing the motion wins based solely on undisputed facts and matters of law. The Commission treats such motions as a court would treat motions for summary judgment in civil practice. (*Westcom Long Distance, Inc. v. Pacific Bell et al.*, D.94-04-082, 54 CPUC2d 244, 249.)

B. Crow Development's Motion to Dismiss

Crow Development contends in its motion that the complaint should be dismissed as a matter of law. Under one of the complaint's theories, Crow Development is itself a public utility, and as such, has violated various statutes. Under the other theory, Crow Development is not a public utility but has violated various provisions of law (including Commission orders) applicable to non-utilities. We will deal with those two theories in sequence.

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[5] The moving parties have filed their motions to dismiss pursuant to Rule 56 of the Commission's Rules of Practice and Procedure.

1. Is Crow Development Operating as an Uncertified Public Utility?

a) Crow Development's Position

Crow Development brings its motion to dismiss on the grounds that Crow Development is not a public utility over which the Commission has jurisdiction because it has not "dedicated" its property, including the easements providing utility service to the facility parcel, to a public use as defined by law. Crow Development also argues that it is not delivering telephone messages through easements, conduits and telephone lines because it does not own telephone cabling or other devices that would permit it to transmit telephone messages, and a conduit alone is not capable of transmitting a telecommunications message.

In support of its motion, Crow Development has submitted a declaration by William H. Lane, Jr., the managing general partner who is primarily responsible for the day-to-day operations of Crow Development. Lane states that, contemporaneous with the 1985 acquisition of Park Place, Crow Development and Winthrop Operating entered into the Reciprocal Easement Agreement among the Park Place landowners and their successors-in-interest. This Agreement governs, among other things, construction, operation, access, parking, and certain easements for the benefit and to the burden of the facility parcel and development parcel. The Lane declaration also makes certain legal conclusions and arguments which we do not rely on here.

b) Complainants' Response

Complainants did not file any responsive declaration setting forth specific facts showing a triable issue of material fact. Rather, complainants argue that the verified complaint and the admissions in the Lane Declaration

demonstrate that there is a triable issue as to whether Crow Development controls easements and facilities on its property that are dedicated to the public use. According to complainants,

> "There is no dispute in this case that Pacific has telephone facilities in conduits across CWDLP's [Crow Development's] property and that CoxCom has cable television facilities in the conduits as well. There is also no dispute that tenants in the Jamboree Buildings could not obtain local exchange telephone service from Pacific (or any local exchange carrier) or cable television service from CoxCom if these companies did not use the conduits owned and controlled by CWDLP. Finally, there is no dispute that CWDLP had denied Pacific, CoxCom and Cox access to the conduits and, thus, CWDLP has sole and complete control over the conduits.
>
> "These facts establish that there is a material issue of fact as to whether CWDLP, had dedicated its facilities to the public use . . ." (Complainants' Opposition to Crow Development's Motion to Dismiss at pp. 7-8.)

c) History of the Dedication Requirement

In 1912, the California Supreme Court held that a member of the public could not demand service from a distributor of water if the distributor had not dedicated its water rights to public use. (*Thayer v. California Development Company* (1912) 164 Cal. 117, 126.) Since its decision in *Thayer*, the Court has consistently interpreted the statutory definitions of public utilities to apply only to entities that have dedicated their property to public use. (See, e.g., *Associated Pipe Line Co. v. Railroad* Commission (1917) 176 Cal. 518, 523-525; *Allen v. Railroad*

Commission (1918) 179 Cal. 68, 89; *Cal. Water & Tel. Co. v. Public Utilities Commission* (1959) 51 Cal.2d 478, 494.)

The test for determining whether dedication has occurred is:

> "whether or not [a person has] held himself out, expressly or impliedly, as engaged in the business of supplying [a service or commodity] to the public as a class, not necessarily to all of the public, but to any limited portion of it, such portion, for example, as could be served by his system, as contradistinguished from his holding himself out as serving or ready to serve only particular individuals, either as an accommodation or for other reasons peculiar and particular to them." (*Van Hoosear v. Railroad Commission* (1920) 184 Cal. 553, 554, citations omitted.)

In 1960, the California Supreme Court re-examined the dedication requirement in *Richfield Oil Corp. v. Public Utilities Commission* (1960) 54 Cal.2d 419. The Court noted that if it were called upon to decide the question for the first time in light of modern constitutional law principles, it would have serious doubts that the broad language of § 216 should be interpreted as including the limitation of dedication. (*Id.* at 428.) "In view of the history of the act and the substantial reliance on its consistent interpretation and application by this court and the commission for more than 40 years, however, it must be concluded that the Legislature by its repeated reenactment of the definitions of public utilities without change has accepted and adopted dedication as an implicit limitation on their terms." (*Id.* at 430.)

In *Greyhound Lines, Inc. v. Public Utilities Commission* (1968) 68 Cal.2d 406, the Court again noted that the requirement of dedication as a condition precedent to regulation as a public utility is a judicial doctrine,

supported by constitutional principles which have now passed into history. Thus, the Court stated that it would be inappropriate "to extend its restraining power further than logic and precedent require." (*Id.* at 413.) Nevertheless, the Court found that the focal point in cases dealing with the Commission's authority to require service extensions "has regularly and properly been the question of dedication. It was early decided and remains the law that the perimeter of commission authority to order service modifications is staked out by the limits of a utility's dedication or devotion of its property to public use." (*Id.* at 411.)

Whether or not dedication has occurred is a factual issue, to be determined on a case-by-case basis. Courts caution that "to hold that property has been dedicated to a public use is not a trivial thing, and such dedication is never presumed without evidence of unequivocal intention." (*Allen*, 179 Cal. at 85, citations omitted.) However, such dedication may be inferred from action and need not be explicit. (*Greyhound Lines*, 68 Cal.2d at 414, citing *Yucaipa Water Co. No. 1 v. Public Utilities Commission* (1960) 54 Cal.2d 823, 827.)

Numerous cases have held that a landlord's provision of services to tenants does not constitute dedication to public use. In *Story v. Richardson* (1921) 186 Cal. 162, 166-167, the Court considered the public utility status of the owner of an office building who supplied electrical energy to tenants of his own building, as well as to non-tenants occupying nearby property. The Court held that the plaintiff was not a public utility because he had not devoted his facilities to public use. "The essential feature of a public use is that it is not confined to privileged individuals, but is open to the indefinite public. It is this indefiniteness or unrestricted quality that gives it its public character." (*Id.* at 167, quoting *Thayer v. California Development Company*, 164 Cal.

at 127.) The Court concluded, "There was no such general offer on the part of plaintiff. Plaintiff's plant was designed primarily and pre-eminently for supplying service to the tenants of his own building, and the special sales of electrical energy and steam were wholly subsidiary and ancillary to this main purpose." (*Story v. Richardson*, 186 Cal. at 167.)[6]

Most recently, in D.00-03-055, our order modifying the Rights-of-Way Decision and denying rehearing, we rejected Cox's argument that building owners clearly fall within the definition of a public utility. Cox had argued that we erred by failing to assert jurisdiction over private property owners as public utilities. Cox's theory, as in the instant case, was that the managing by private property owners of "rights of way (real estate), cross-connects on the owner's side of the MPOE [minimum point of entry] (wires, instruments and appliances), inside wire and INC (wires and cables) constitutes owning, controlling and managing telephone lines" under § 233, and as a consequence, that property owners who are responsible for such management and control do so for compensation as required by § 234. Cox also contended that private property owners are public utilities pursuant to § 216(c) because they deliver telephone service directly or indirectly to a portion of the public.

In D.00-03-055, we rejected Cox's argument:

> "Cox has not demonstrated legal error. While we do not reach the issue of whether, under some circumstances, we could assert jurisdiction over building owners, the leading cases on the

[6] The Commission has relied on the holding in *Story v. Richardson* to determine that property owners providing electricity to tenants are not public utilities. (i.e., *Bressler v. Bayshore Properties, Inc.*, D.87396 (1977) 81 CPUC 746.)

> definition of a public utility do not support Cox's contention that building owners clearly fall under that definition.
>
> "Cox's arguments are more in the nature of policy arguments than legal arguments. Much of Cox's petition address what Cox contends are the decision's failure to provide effective enforcement mechanisms to back up its policies. Cox presents the example of a building owner who unilaterally discriminates against a competitive carrier, without the agreement or cooperation of the [incumbent local exchange carrier]. In such a case, according to Cox, the Commission would be without authority to redress the discrimination.
>
> "We believe that the [rights-of-way] rules adopted in the decision strike a balance between [Building Owners and Managers Association of California's] contention that we should allow exclusive agreements and Cox's claim that we should assert jurisdiction over building owners as public utilities. Thus, we decline to modify the decision as suggested by Cox on policy grounds." (D.00-03-055 at p. 11, citations omitted.)

d) Crow Development Has Not, As A Matter of Law, Dedicated Its Property to Public Use

Even if all the material facts listed by complainants are taken as true, they still do not establish an unequivocal intention, either expressed or inferred through conduct, that Crow Development has dedicated its property to public use.

Complainants allege that:[7]

- Crow Development has constructed conduits running through easements on its property to provide utility service to buildings on its own and adjacent properties;[8]
- the conduits are used to deliver telephone traffic to Jamboree's telephone facilities, which in turn are used to deliver the traffic to Jamboree's tenants;
- Crow Development, or its agents, manage for compensation the common areas on the development parcel on behalf of Crow Development;
- Pacific has been providing and currently provides telephone service to the facility parcel;
- CoxCom uses coaxial cables it installed in 1993 and 1996 in the conduits that run across the development parcel to provide cable television service on the facility parcel, and Cox has an agreement with CoxCom whereby Cox leases capacity on CoxCom's facilities to provide local exchange telephone service;
- Cox has received requests from tenants at the facility parcel, including Caltrans, to provide them with Cox's local exchange and other advanced telecommunications services.

[7] Complainants listed these issues of disputed fact in response to the ALJ's request made at the July 3 PHC. They did not support these issues with declarations in opposition to this motion.

[8] Complainants admit this fact solely for these actions at the Commission, and not before the Superior Court.

- Crow Development has denied access to its property in order to provide cable television and telecommunications services and, as a result, CoxCom is unable to maintain and upgrade its facilities in a manner that would allow Cox to provide the requested telephone service to the facility parcel.

The California Supreme Court found that even where the property owners were essentially reselling the utility services in question (i.e., the property owners were providing water and electricity and billing tenants for those services), such resale to tenants was insufficient to establish dedication. Here, in contrast, complainants do not even allege that Crow Development is reselling telephone services, or that Crow Development is receiving revenue from Pacific for exclusive access or marketing arrangements. In a hypothetical case in which a building owner or property manager is receiving revenue from the telecommunications carrier for exclusive access or marketing arrangements, there may be a factual basis for finding the owner is a public utility. However, complainants do not even make such an allegation, let alone allege it as a disputed issue of material fact supported by declarations.

Complainants argue that the above cited California Supreme Court cases finding no dedication are inapplicable, because they are based on a prior relationship, such as landlord/tenant. According to complainants, in this case no private contractual agreements, or a preexisting relationship, exists between Crow Development and Jamboree's tenants.

However, there is a relationship (the Reciprocal Easement Agreement) between Crow Development and Jamboree's predecessor, Crow

Operating.[9] The fact that Jamboree's building is on a landlocked parcel does not change the fact that this is essentially a private dispute currently being litigated in the civil courts.

The Superior Court is currently addressing the easement entitlement issue, that is, what entities are legally entitled to a utility easement over Crow Development's property. It is for the Superior Court to determine whether they have recourse against Crow Development, as well as against their landlord Jamboree.[10] In fact, the Superior Court has granted Cox and CoxCom's motion for a preliminary injunction to the extent that CoxCom may continue to maintain and repair the cable facilities pending a decision on the merits of the Cox Superior Court Action.

The conduits here serve the benefit of a finite number of people located on the facility parcel, not the public at large. Complainants cite *Richfield Oil Corporation v. Public Utilities Commission*, 54 Cal.2d at 431 for the proposition that a utility that has dedicated its property to public use is a public utility even though it may serve only one or a few customers. However, *Richfield* did not cite this proposition for determining whether an entity was a public utility in the first

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[9] According to the recitals in the Reciprocal Easement Agreement, the document came about because the parties thereto (Crow Development and Jamboree's predecessor, Winthrop Operating) desired to make an integrated use of their respective parcels, and Crow Development desired to further develop the area as a mixed use project.

[10] Complainants argue that there is sufficient evidence that Crow Development is a public utility because the tenants have the right to demand that Crow Development continue to allow them to use the easements and conduits on Crow Development's property to provide them with essential utility service. However, it does not follow that because the tenants may have alleged unspecific "rights," Crow Development is a public utility. To the extent the tenants have other specific rights, they can enforce them in the Superior Courts.

instance, but rather for the proposition that a company that has already been found to be a public utility remains so even though it turns its distributing system over to a publicly or privately owned utility, and thereafter limits its business to supplying the utility that directly serves the public. Moreover, the cases cited by *Richfield* on this point stand for the proposition that a public utility does not cease being so because its customers dwindle (*Van Hoosear v. Railroad Commission*, 184 Cal. at 557) or that an entity is providing a public service if it serves an indefinite portion of the public who wish to purchase mobile phone service, as opposed to all members of the public, citing *Commercial Communications v. Public Utilities Commission* (1958) 50 Cal.2d 512. Neither situation exists on the record here.

e) Conclusions Regarding Applicability of Other Public Utility Statutes to Crow Development

Because we grant this motion to dismiss on the basis that, as a matter of law, there is no dedication to public use in this case, and because an affirmative finding on the dedication issue is a condition precedent to regulation, it is not necessary to address whether Crow Development falls within the definition of a public utility under §§ 233, 234, or 216(c). It is also not necessary for us to address whether Crow Development is violating, *inter alia*, § 453(a), or §§ 1001 and 1013(a) because those sections apply only to a public utility.

Finally, for the reasons stated in the preceding paragraph, complainants also have not stated a cause of action under § 767.5, which addresses sharing of space on pole attachments primarily between public utilities and cable television providers. Section 767.5(a)(2) includes "conduit" within its definition of "support structure", and § 767.5 (a)(1) defines a public utility as an entity which owns or controls a support structure.

In *Century Southwest Cable Television, Inc. v. CIIF Associates* (9th Cir. 1994) 33 F.3d 1068, 1071, the court held that this statute referred only to public easements, not private property. Also, in the order modifying the Rights-of-Way Decision and denying rehearing, we stated that the Rights-of-Way Decision made very clear that the Commission was not exercising jurisdiction over private property owners as a class. (D.00-03-055 at 9, citing the Rights-of-Way Decision at 101.) Therefore, § 767.5 does not confer jurisdiction on Crow Development absent a showing of dedication of its property to public use.

2. Conclusions Regarding Alleged Violations of Law Applicable to Non-Utilities

We also dismiss complainants' claims against Crow Development as a non-utility. Section 2111 provides that every corporation or person, other than a public utility, which or who knowingly violates or fails to comply with, or procures, aids, or abets any violation of any order, decision or rule of the Commission is subject to certain penalties.

Complainants allege that Crow Development is violating the Rights-of-Way Decision. However, the orders and rules adopted in the Rights-of-Way Decision apply to public utilities as defined by that decision. Because we find an absence of dedication for public use, the Rights-of-Way Decision does not apply to Crow Development.

Complainants also make the strained argument that Crow Development is aiding and abetting a complainant's (Cox's) violation of D.95-12-056, the Commission's order adopting rules pertinent to interconnections of competitive local carriers with incumbent local exchange carriers in order to further local exchange telecommunications competition. Complainants do not cite a particular ordering paragraph or provision of this lengthy decision

pertinent to its cause of action. However, the complaint asserts that Cox has a legal obligation to provide services to Park Place pursuant to Appendix C at 4(F)(2) of D.95-12-056, because Park Place is within 300 feet of Cox's existing facilities. Presumably, complainants allege Crow Development is violating § 2111 because it is denying Cox access to the conduits.

However, nowhere in D.95-12-056 did we assert jurisdiction over private property owners to facilitate access to rights-of-way, absent a finding of a dedication to public use.[11] Rather, D.00-03-055 (which modified and denied rehearing of the Rights-of-Way Decision) clarified that when the carrier fails to reach agreement with a building owner for access, its ultimate remedy is to condemn the property at the appropriate time.

> "The decision provides that when the carrier fails to reach agreement with a building owner for access, 'the carrier may seek resolution of its dispute in the appropriate court of civil jurisdiction' as an alternative to filing a complaint with the Commission against another carrier. (D.98-10-058 at pp. 101-102.) Our intent here was not to create any right of action. Rather, this is a reference to a telephone utility's eminent domain rights under Public Utilities Code section 616 (as well as section 626, which was enacted after D.98-10-058 was issued.)" (D.00-03-055 at 12.)

In summary, we find that, accepting as true the complainants' material factual allegations, they do not sustain a finding of dedication.

[11] As stated above, in cases in which the building owner is receiving revenue from the telecommunications carrier for exclusive access or marketing arrangements, there may be a basis for finding the owner is a public utility.

Consequently, we find that Crow Development is not a public utility and we grant Crow Development's' motion to dismiss the complaint as to itself.

C. Pacific's Motion to Dismiss

Pacific contends that both of complainants' theories supporting their complaint are wrong as a matter of law. Under one theory, Pacific has violated the Rights-of-Way Decision, because Pacific has an arrangement with Crow Development that has the effect of restricting Cox's access to the property.[12] Under the other theory, Pacific has violated § 626 because Pacific has an affirmative duty to prevent property owners from limiting other carriers' access to their properties. We will address these two theories together.

1. Alleged Violations of the Rights-of-Way Decision

a) Pacific's Position

In the Rights-of-Way Decision (D.98-10-058 at 130, Conclusion of Law 71, as modified in D.00-03-055), the Commission prohibited all carriers on a prospective basis from entering into any type of arrangement or agreement with private property owners that has the effect of restricting the access of other carriers to the owners' properties or discriminating against the facilities of other carriers. This decision also permits a carrier to file a complaint against another carrier with an access arrangement or agreement with a private building owner, including any executed prior to the date of the decision, that allegedly has the effect of restricting access of other carriers or discriminating against their

[12] Cox is the only entity that alleged claims against Pacific in the complaint, and therefore Pacific directed its motion to Cox. However, all complainants oppose Pacific's motion.

facilities. (*Id.* at Conclusion of Law 72.) Cox alleges that Pacific has violated this decision by entering into a preferential arrangement with Crow Development.

A declaration by Robert Whittaker, an engineer and Orange County fiber planner for Pacific, disputes this allegation. According to Whitaker, Pacific does not have an exclusive access agreement or arrangement with Crow Development for access to the tenants at Park Place. Pacific originally placed its facilities on the Park Place property as a result of a service request when the property was held in a single ownership before Crow Development's purchase. Pacific states that prior to Cox filing the instant complaint, it informed Cox that although Pacific had facilities located in the conduit, Pacific neither owned the structure nor had an easement on the property. Pacific verified this fact by ordering a title report which stated that there are no easements in favor of Pacific on Crow Development's development parcel.

Whittaker also says that Crow Development has locked the manholes, denying access to Pacific's facilities, and has denied Pacific's requests to maintain and upgrade its facilities. Whittaker says that Pacific lacks facilities to serve all customer requests as a result of Crow Development's refusal to grant access, and that Pacific informed Cox of these facts before Cox filed the instant complaint. For these reasons, Pacific argues that Crow Development has treated both Pacific and Cox identically, that Pacific has not benefited from any access superior to that of Cox, and that therefore complainants have not stated a cause of action under the Rights-of-Way Decision against Pacific. Pacific also submitted a declaration by a Pacific Telesis Group Senior Counsel, Lori L. Ortenstone, who concludes that Pacific does not have an easement on Crow Development's property.

b) Complainants' Response

The crux of complainants' argument is that Crow Development has granted Pacific a preference by continuing to allow Pacific to use the cables on Crow Development's property to provide telephone service to tenants on the facility parcel, while denying Cox access to these cables to provide telephone service, and that Pacific has not objected to this preference because it benefits from the status quo.

Complainants believe there are triable issues of material fact concerning whether Pacific has an exclusive arrangement with Crow Development that allows Pacific to serve tenants on the facility parcel. These facts are as follows: (1) Pacific is the exclusive provider of local exchange telephone service on the property; (2) Pacific placed its facilities on Crow Development's property pursuant to the permission of the property owners; (3) Pacific presently provides telephone service to all 62 tenants at the facility parcel; (4) Pacific has failed and refused to take any action to require Crow Development to allow Cox or other facilities-based carriers to obtain access to Crow Development's property; and (5) Pacific benefits from its arrangement with Crow Development.

Complainants argue that by the Commission's adoption of the Rights-of-Way Decision, the Commission intended to foster competition on private property among carriers to benefit consumers. Complainants submit that the Commission should broadly construe the terms "arrangement" or "agreement" so that tenants, especially on multiple dwelling properties, can have a choice of telecommunications carriers. Complainants also argue that the current arrangement which allows Pacific to remain on Crow Development's property to provide telephone service to the facility parcel, and which excludes

Cox and other facilities-based carriers, falls within the meaning of the Rights-of-Way Decision if Pacific is on the property pursuant to a license, because a license is exclusive to Pacific, unassignable, and falls outside the terms and conditions of Cox's Interconnection Agreement with Pacific.

Complainants include the declaration of one of their counsel, William K. Sanders, with their response. Mr. Sander's declaration authenticates certain documents attached thereto, including various responses to date requests, letters between Jamboree and Crow Development, and an excerpt from an interconnection agreement between Cox, CoxCom, and Pacific. Complainants also include the declaration of Phillip Bonham, Commercial Access Manager of CoxCom, who addresses CoxCom's provision of cable services to the facility parcel, Cox's receipt of requests from tenants at the facility parcel for local exchange service, Jamboree's request to Crow Development on Cox's behalf for an easement so that Cox can provide the requested telephone service, and the fact that Crow Development has filed a cross complaint against Cox and CoxCom for trespass and ejectment.

2. Alleged Violations of § 626

a) Pacific's Position

Section 626 provides:

> "On or after January 1, 2000, a public utility may not enter into any exclusive access agreement with the owner or lessor of, or a person controlling or managing, a property or premises served by the public utility, or commit or permit any other act, that would limit the right of any other public utility to provide service to a tenant or other occupant of the property or premises."

Presumably because Pacific first began providing service to the facility parcel prior to January 1, 2000, complainants do not argue that Pacific violated § 626 by entering into an exclusive access agreement with Crow Development on or after January 1, 2000. Rather, complainants argue that Pacific has violated § 626 by committing or permitting an act that would limit the right of another public utility to provide telephone service to the facility parcel.

Pacific states that it has not entered into an exclusive access agreement with Crow Development, nor has it permitted any other act which would have the effect of limiting Cox's provision of service. Pacific also maintains that it has not limited Cox's ability to provide service to tenants in Jamboree's building at Park Place, and does not have control over Crow Development's actions.

Pacific also maintains that it does not have an easement on Crow Development's property. Pacific argues that it does not have either a recorded easement or an implied easement because Pacific was neither an original grantor or grantee. According to Pacific, it also does not have a prescriptive easement because its presence on the property was never hostile to the owner but was by service request. Pacific argues that it has a license to be at Park Place, which is an unassignable privilege. Thus, Pacific may not assign to Cox any license rights that it might have.

b) Complainants' Response

Complainants argument regarding this issue is similar to their argument concerning the Rights-of-Way Decision. Therefore, according to complainants, the relevant triable issues of material facts concerning Pacific's alleged § 626 violation are that (1) Pacific is the exclusive provider of local

exchange telephone service on the property; (2) Pacific placed its facilities on Crow Development's property pursuant to the property owners' permission; (3) Pacific presently provides telephone service to all tenants at the facility parcel; (4) Pacific has not taken any action to require Crow Development to allow Cox or other carriers to obtain access to Crow Development's property; and (5) Pacific is benefiting from the arrangement with Crow Development.

3. Discussion

We dismiss complainants' two causes of action against Pacific without prejudice to them refiling their claims against Pacific after the Superior Court renders a final decision concerning Cox's and other parties' entitlement and access to the utility easements. In the instant case, Pacific maintains that it does not have an easement, but only a license, on Crow Development's property. Although Cox admits that the Superior Court is the proper forum to decide the nature of Pacific's property rights, Cox believes that Pacific has an easement on Crow Development's property and extensively briefs this point.[13]

The nature of the various parties' property rights over the utility easements will likely impact our decision on whether disputed issues of material fact exist in the causes of action against Pacific. The Superior Court is currently addressing easement entitlement issues (what entities are legally entitled to an easement over Crow Development's property), and its findings should be determinative on the nature of these property rights. This action should be dismissed without prejudice until such time as the Superior Court renders a final

[13] Cox explains that it uses the term "may have an easement" because the property rights Cox refers to can only be established through the adjudicative process in the Superior Court. (See Complainants' August 9, 2000 Opposition to Pacific Bell's Motion to Dismiss at p. 11, fn. 12.)

decision on this issue. (See Appendix A for a brief overview of the various Superior Court matters.)

Although Pacific is not a party to the various Superior Court actions, Cox and Crow Development, as well as the owner of the facility parcel (Jamboree) are, and the determination of these parties' property rights will likely impact our decision. For example, in this case, Cox does not dispute that Pacific first entered the property pursuant to a license from Fluor, but argues that the subsequent sale of the property to Crow Development and Winthrop Operating changed the nature of Pacific's rights on the property, and that there is ample evidence to support its claim that Pacific may have an equitable easement or easement by estoppel on Crow Development's property. The effect of this subsequent sale on property rights, among other things, is currently before the Superior Court.

Logic and efficiency also support this outcome. Cox admits that in this particular case, the Superior Court is the proper forum to decide issues regarding the nature of Pacific's property rights. It would not promote judicial economy for the Commission to make complex title and access determinations vis-à-vis Cox and Pacific as part of exercising its regulatory authority when the Superior Court is currently litigating title and access issues. (See *Camp Meeker Water System v. Public Utilities Com.* (1990) 51 Cal.3d 845, 861 ["the commission expressly recognizes that its functions do not include determining …interests in or title to property, those being questions for the courts. It claims only the power to construe, for purposes of exercising its regulatory authority and ratemaking authority, the existing rights of a regulated utility.]) Furthermore, if these proceedings are litigated concurrently, the potential exists for the two fora to reach inconsistent results.

We choose to dismiss, as opposed to stay this proceeding because Pub. Util. Code § 1701.2(d) states that adjudication cases shall be resolved within 12 months of initiation unless the Commission makes findings why the deadline cannot be met and issues an order extending that deadline. Furthermore, together with their comment to the draft decision, complainants sought leave to extensively amend their complaint, raising new issues for the first time. It is more consistent with this statute to dismiss the proceeding without prejudice, because it is unclear at this point how long the proceeding would have to be stayed, or whether the parties might resolve their differences while the other proceedings are being adjudicated. Finally, depending on the outcome of the Superior Court litigation, Cox may get the access it desires without this Commission's further involvement.

D. TRO and Preliminary Injunction

The summary disposition of this case demonstrates that the requesting parties have not prevailed on the merits of their complaint. Therefore, we deny complainants request for a TRO and preliminary injunction.

We also note that the Superior Court has granted Cox and CoxCom's motion for a TRO and preliminary injunction to the extent that CoxCom may continue to maintain and repair the cable facilities pending a decision on the merits of that case. Thus, the status quo is being maintained while the Superior Court case is pending.

E. Penalties Against Cox

Pacific argues that complainants named Pacific as a defendant and requested that the Commission levy penalties against it, even though Pacific informed Cox prior to the complaint's filing that Pacific had no easement on Crow Development's property and that it had also been denied access by

Crow Development. For this reason, in addition to requesting that the complaint be dismissed, Pacific also requests that Cox should be sanctioned or admonished for failing to even minimally investigate the facts it alleges. Complainants vigorously oppose this request. In this murky area of law, we see nothing in their conduct in bringing this complaint that would justify assessing penalties.

IV. Comments on Draft Decision

The draft decision of ALJ Econome in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7(b). Complainants filed timely comments and Crow Development and Pacific filed timely reply comments to the draft decision. We affirm the draft decision regarding complainants' causes of action against Crow Development, but change the outcome regarding complainants' causes of action against Pacific, and dismiss those without prejudice for the reasons set forth in Section III C. We also change other portions of the decision as well as certain findings of fact and conclusions of law, to reflect this outcome. We have also made other changes to the draft decision to improve the discussion, add references to the record, and correct typographical errors.

Several specific comments merit a more detailed response. Complainants argue they were prevented from completing discovery in this case. First, complainants never raised this as an issue prior to completing the briefing on the motions to dismiss and the draft decision issuing.[14] Furthermore, complainants

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[14] In their comments, complainants cite page 16 of their opposition to Crow Development's motion to dismiss to demonstrate they specifically requested their rights to discovery. However, on page 16, complainants request that Crow Development's motion to dismiss be denied, because there are material disputed issues of fact and as a result, that they have a right to discovery and a hearing. Complainants

Footnote continued on next page

served over 100 data requests on Crow Development. Even if complainants received responses to some of these requests after briefing was complete, complainants never sought leave to supplement their briefing.

Complainants also state they were denied discovery because the ALJ did not rule on their June 22, 2000 emergency motion to compel discovery in this case and a related case before the Commission. However, at the prehearing conference where the motion was argued, complainants' counsel represented that that the discovery underlying the motion to compel (an inspection of the utility easements on Crow Development's property for the purpose of surveying the land to obtain a legal description of the property) was primarily focused on Cox's condemnation case (C.00-05-022) and that the only reason the discovery was noticed in the instant case was because it was conceivable that the information sought would be relevant in this case. (7/3/00 prehearing conference transcript at 25:7-19.) Because C.00-05-022 is dismissed and closed[15], the motion to compel discovery in this case is denied.

At the same time as complainants filed their comments to the draft decision, they filed a motion for leave to amend the complaint. Because this decision dismisses complainants' causes of action against Pacific without prejudice, complainants may raise these new issues if they file a subsequent

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never requested to complete any discovery prior to the Commission ruling on the motion to dismiss until they filed their comments in response to an adverse draft decision.

[15] See D.00-11-038.

action against Pacific. Complainants' motion for leave to amend the complaint is denied.[16]

The ALJ's revised draft decision was mailed to the parties for comment pursuant to Pub. Util. Code § 311(e) and (g), and Rule 77.6 for comments limited to the proposed changes. Complainants filed comments and Crow Development and Pacific filed replies. We make no changes to the revised draft decision.

Findings of Fact

1. Competition in the telecommunications industry means that many different providers may provide the same or different services to different tenants within a single industrial or commercial development.

2. The parties to this proceeding, and others, are involved in multiple actions both at this Commission and in the Superior Court which, in part, seek to resolve the same underlying problem, that is, access to the existing utility easements.

3. Complainants did not file any declaration in response to Crow Winthrop's motion setting forth specific facts showing a triable issue of material fact. Rather, complainants argue that the verified complaint and the admissions in the Lane Declaration demonstrate that there is a triable issue as to whether Crow Development controls easements and facilities on its property that are dedicated to the public use.

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[16] In their comments, complainants argue at length that the Commission has jurisdiction to enjoin Crow Development from interfering with Pacific's continued use of the easements. However, Complainants make this request for the first time in their comments. Their motion for Temporary Restraining Order and Preliminary Injunction requested an order requiring Crow Development to cease operating as a public utility without first obtaining a certificate of public convenience and necessity, and to allow complainants access to the easements on Crow Development's property.

4. Complainants listed the following disputed issues of material fact with respect to Crow Development:

- Crow Development has constructed conduits running through easements on its property to provide utility service to buildings on its own and adjacent properties;
- the conduits are used to deliver telephone traffic to Jamboree's telephone facilities, which in turn are used to deliver the traffic to Jamboree's tenants;
- Crow Development, or its agents, manage for compensation the common areas on the development parcel on behalf of Crow Development;
- Pacific has been providing and currently provides telephone service to the facility parcel;
- CoxCom uses coaxial cables it installed in 1993 and 1996 in the conduits that run across the development parcel to provide cable television service on the facility parcel, and Cox has an agreement with CoxCom whereby Cox leases capacity on CoxCom's facilities to provide local exchange telephone service;
- Cox has received requests from tenants at the facility parcel, including Caltrans, to provide them with Cox's local exchange and other advanced telecommunications services.
- Crow Development has denied access to its property in order to provide cable television and telecommunications services and, as a result, CoxCom is unable to maintain and upgrade its facilities in a manner that would allow Cox to provide the requested telephone service to the facility parcel.

5. The utility conduits serve the benefit of a finite number of people located on the facility parcel, not the public at large.

6. Complainants do not allege that Crow Development is reselling telephone services, or that Crow Development is receiving revenue from Pacific for exclusive access or marketing arrangements.

7. There is a relationship (the Reciprocal Easement Agreement) between Crow Development and Jamboree's predecessor, Crow Operating. The fact that Jamboree's building is on a landlocked parcel does not change the fact that this is essentially a private dispute currently being litigated in the civil courts.

8. The Superior Court is currently addressing the easement entitlement issue, that is, what entities are legally entitled to a utility easement over Crow Development's property. It is for the Superior Court to determine whether they have recourse against Crow Development, as well as against their landlord Jamboree.

9. Cox alleges that the material facts as to Pacific are as follows: (1) Pacific is the exclusive provider of local exchange telephone service on the property; (2) Pacific placed its facilities on Crow Development's property pursuant to the permission of the property owners; (3) Pacific presently provides telephone service to all 62 tenants at the facility parcel; (4) Pacific has failed and refused to take any action to require Crow Development to allow Cox or other facilities-based carriers to obtain access to Crow Development's property; and (5) Pacific benefits from its arrangement with Crow Development.

10. The nature of the various parties' property rights over the utility easements will likely impact our decision on whether disputed issues of material fact exist in the causes of action against Pacific.

Conclusions of Law

1. A motion to dismiss essentially requires the Commission to determine whether the party bringing the motion wins based solely on undisputed facts and matters of law.

2. The Commission treats motions to dismiss under Rule 56 as motions for summary judgment in civil practice.

3. Since 1912, the California Supreme Court has consistently interpreted the statutory definitions of public utilities to apply only to entities that have dedicated their property to public use.

4. Whether or not dedication has occurred is a factual issue, to be determined on a case-by-case basis. Courts caution that to hold that property has been dedicated to a public use is not a trivial thing, and such dedication is never presumed without evidence of unequivocal intention. However, such dedication may be inferred from action and need not be explicit.

5. Numerous California cases have held that a landlord's provision of services to tenants does not constitute dedication to public use.

6. In D.00-03-055, our order modifying the Rights-of-Way Decision (D.98-10-058) and denying rehearing, we rejected Cox's argument that building owners clearly fall within the definition of a public utility.

7. Even if all the material facts listed by complainants are taken as true, they still do not establish an unequivocal intention, either expressed or inferred through conduct, that Crow Development has dedicated its property to public use.

8. Because we grant this motion to dismiss on the basis that, as a matter of law, there is no dedication to public use in this case, and because an affirmative finding on the dedication issue is a condition precedent to regulation, it is not

necessary to address whether Crow Development falls within the definition of a public utility under §§ 233, 234, or 216(c). It is also not necessary for us to address whether Crow Development is violating, *inter alia*, § 453(a), or §§ 1001 and 1013(a) because those sections apply only to a public utility.

9. Section 767.5 does not confer jurisdiction on Crow Development absent a showing of dedication of its property to public use.

10. Because we find an absence of dedication for public use, the Rights-of-Way Decision does not apply to Crow Development.

11. Complainants § 2111 claim against Crow Development should be dismissed.

12. D.00-03-055, modifying and denying rehearing of the Rights-of-Way Decision, clarified that when the carrier fails to reach agreement with a building owner for access, its ultimate remedy is to condemn the property at the appropriate time.

13. Because the Superior Court is currently addressing easement entitlement issues (what entities are legally entitled to an easement over Crow Development's property), its findings should be determinative on the nature of these property rights. This determination will likely impact our decision on whether disputed issues of material fact exist in the causes of action against Pacific. Therefore, complainants' action against Pacific should be dismissed without prejudice until such time as the Superior Court renders a final decision on this issue.

14. Complainants' June 22, 2000 emergency motion to compel discovery should be denied.

15. Complainants' May 25, 2001 motion for leave to amend the complaint should be denied.

16. Crow Development's motion to dismiss the complaint should be granted. The complaint against Pacific should be dismissed without prejudice.

17. Complainants' request for a TRO and preliminary injunction should be denied.

18. No penalties should be assessed against Cox for bringing this complaint.

19. In light of the multiple cases now in progress, this order should be effective immediately.

O R D E R

IT IS ORDERED that:

1. Crow Winthrop Development Limited Partnership's (Crow Development) motion to dismiss this complaint shall be granted. The complaint against Pacific Bell (Pacific) shall be dismissed without prejudice.

2. Case 00-05-023, the complaint filed by the State of California Department of Transportation, Cox California Telecom, L.L.C. dba Cox Communications, and Coxcom, Inc., dba Cox Communications of Orange County is dismissed as to Crow Development, and is dismissed without prejudice as to Pacific.

3. Complainants' June 22, 2000 emergency motion to compel discovery is denied.

4. Complainants' May 25, 2001 motion for leave to amend the complaint is denied.

5. This proceeding is closed.

This order is effective today.

Dated August 23, 2001, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
RICHARD A. BILAS
CARL W. WOOD
GEOFFREY F. BROWN
Commissioners

Appendix A--Other Court and Administrative Actions

1. Jamboree L.L.C. (Jamboree) Superior Court Action

A. Relationship Between Crow Development and Jamboree

In March 1999, Jamboree commenced a state court action against, *inter alia*, Crow Development.[1] According to a First Amended Complaint filed in that action on January 18, 2000,[2] in 1985, two partnerships, Crow Winthrop Operating Partnership (Winthrop Operating) and Crow Development, each acquired separate portions of land and office space located at Park Place. Winthrop Operating acquired Park Place's then-existing office buildings, called Fluor World Corporation Headquarters Facility, and underlying land (the facility parcel). Crow Development owned and still owns a majority of the surrounding 90 acres (development parcel).

Also, Crow Development and Winthrop Operating entered into an agreement entitled "Construction, Operation and Reciprocal Easement Agreement" dated July 26, 1985 (Reciprocal Easement Agreement).

In April 1996, Winthrop Operating defaulted on its loan. As a result of Winthrop Operating's plan of reorganization confirmed by

[1] This case is consolidated with multiple other proceedings.

[2] Crow Development requests the Commission take official notice of the First Amended Complaint, which request is granted insofar as we take notice that such a complaint is filed and that the complaint contains certain allegations. We do not take as established facts the allegations set forth in the complaint.

bankruptcy court, a newly created company, Jamboree, became the new owner of the facility parcel.

B. Allegations in Jamboree Superior Court Action

Jamboree's First Amended Complaint alleges seven causes of action against Crow Development.[3] Among other things, Jamboree complains of Crow Development's interference with Jamboree's utility easements. Jamboree alleges, in relevant part, that Crow Development is interfering with Jamboree's ability to access its easements as provided in the Reciprocal Easement Agreement, and such interference prevents providers such as CoxCom and Cox from providing cable and telephone service to the facility parcel. Jamboree seeks a declaration that it be allowed full access to its utility easements, which in turn would give CoxCom and Cox certain access to the easements. Crow Development's motion for official notice attaches copies of the voluminous discovery (many deposition transcripts, etc.) that has occurred in this case.

2. Cox Superior Court Action

On May 17, 2000, before filing the instant case, Cox and CoxCom filed a complaint against Crow Development in Orange County Superior Court for declaratory and injunctive relief. Cox and CoxCom seek a declaration, in relevant part, that (1) CoxCom has both express and implied, affirmative and proscriptive, easements (through the Reciprocal

[3] Jamboree's First Amended Complaint alleges the following seven causes of action: breach of contract (Reciprocal Easement and Management Agreements); specific performance of the Reciprocal Easement Agreement; breach of contract of a settlement agreement; declaratory relief; private nuisance; tortious interference with contract; and tortious interference with prospective business advantage.

Easement Agreement and otherwise) across Crow Development's property to install and maintain its cable system, over which cable television, high-speed internet access and telephone services are provided to Park Place customers, and (2) Cox and CoxCom are entitled to the continued use of these easements without interference from Crow Development. Cox and CoxCom also seek to enjoin Crow Development from denying CoxCom access to its cable distribution system on Crow Development's property and from interfering with CoxCom's operation and maintenance of this cable system.

Crow Development has filed a cross-complaint against Cox and CoxCom in the Cox Superior Court Action for trespass, ejectment, injunctive relief, declaratory relief, and restitution for violations of California Business and Professions Code § 17200. The Cox Superior Court Action has been transferred to the same judge as the Jamboree Superior Court Action.

The Superior Court has ruled on Cox and CoxCom's motion for preliminary injunction, granting it only to the extent that CoxCom may continue to maintain and repair the cable facilities pending a decision on the merits of the case. The court declined to grant a broader preliminary injunction, in part because plaintiffs failed to show that they will prevail on the merits as to any claimed easement rights by virtue of Jamboree's rights or public utility rights. The court also indicated it would consider granting a motion for a limited stay of the Cox Superior Court Action because of the pending action between Crow Development and Jamboree. The court has not rendered a final decision on the merits of the Cox Superior Court Case, nor has Cox or CoxCom dismissed this case or any

of the asserted claims in light of the Superior Court's ruling on the preliminary injunction.

3. C.00-05-022 (Related Commission Complaint)

On the same day that Cox filed the instant case, Cox filed a complaint at this Commission against Crow Winthrop pursuant to Pub. Util. Code § 625, in which Cox seeks a finding that its proposed condemnation of certain easements is in the public interest. We addressed C.00-05-022 in Decision (D.) 00-11-038, rehearing denied in D.01-02-078. In D.00-11-038, we dismissed the proceeding without prejudice to Cox refiling the complaint, depending on the outcome of pending Superior Court litigation over Cox's entitlement to access the utility easements.

(End of Appendix A)

**********Appendix B--SERVICE LIST **********
Last Update on 12-SEP-2000 by: LIL
C0005023 LIST

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(End of Appendix B)